Infineon Technologies (M) Sdn Bhd v Orisoft Technology Sdn Bhd (previously known as Orisoft Technology Bhd) and another application

HIGH COURT (KUALA LUMPUR) — ORIGINATING SUMMONS NOS R3–24–88 OF 2009 AND R3–24–70 OF 2009
MOHAMAD ARIFF J
10 MAY 2010

Arbitration — Arbitral tribunal — Arbitral panel — Arbitrators' fee structure — Fee structure agreed by parties — Whether breached KLRCA Rules — Whether arbitral panel at fault in not complying KLRCA Rules — Whether KLRCA and its director could revoke arbitrators' fee structure — Whether party bound with arbitrators' fee structure in interim order — Arbitration Act 2005 — KLRCA Rules — UNCITRAL Rules

Arbitration — Award — Setting aside — Application to set aside — Non-compliance with agreed procedure — Breach of rules of natural justice — Whether final award offended principles of natural justice — Whether led to substantial miscarriage of justice — Arbitration Act 2005 s 37

Arbitration — Arbitral tribunal — Proceedings — Institutionalised arbitration — Effect of — Whether KLRCA institutionalised arbitration

The substance of the dispute concerned an arbitral award handed down by a three-man arbitral tribunal, where the claimant was Infineon and the respondent was Orisoft, which had counterclaimed against Infineon. Infineon commenced arbitration proceedings against Orisoft under cl 26 of the applicable statement of work executed between the parties for a project called 'Malaysia Payroll and Time Management Systems Agreement'. Orisoft, relying on cl 26, appointed its own arbitrator, Mr Chan Kok Chong and Infineon appointed Dato Shaik Daud Ismail, and both arbitrators jointly appointed Ms Low Beng Choo, as the third arbitrator. The appointment of the panel of arbitrators was confirmed by the KLRCA in accordance with art 7(1) of the UNCITRAL Rules, and was recorded in the letter enclosing the letter of appointment of the presiding arbitrator sent by the KLRCA directly to the presiding arbitrator. Vide the interim order, the parties agreed, inter alia, on the arbitrators' fee structure and the application of the Arbitration Act 2005. As cl 1 of the interim order was made without compliance with r 7(4) of the KLRCA Rules, the KLRCA 'instructed' the arbitrators to revoke the above cl 1 of the order. In respond, the presiding arbitrator stated that neither the director

nor the KLRCA had powers to issue directions to the arbitral tribunal. The presiding arbitrator also informed the director (with the letter copied to the solicitors for the parties) that as the claimant had failed to comply with the interim order, which according to the presiding arbitrator remained in force, the arbitral tribunal had fixed the matter for show cause hearing. The show cause hearing was held as scheduled with the presence of the solicitors of the claimant, the Managing Director of Orisoft and its solicitors. The arbitral tribunal then handed down its final award. The tribunal was satisfied that Infineon had failed to show sufficient cause for its breach or non-compliance of the interim order, in particular in regard to the filing of the points of claim within the stipulated time. In this context, the issues for the consideration of this court were whether there had been compliance with due process on the part of the tribunal, both formal and substantive, and whether the Director of the KLRCA could interfere with the arbitral tribunal. It was contended for the Director of the KLRCA that what the director did was to fix the date to hear the challenge, and this could not be objectionable in itself because the KLRCA administered the arbitration, including fees to be paid to arbitrators. In this regard, the KLRCA administered the procedural aspects of the arbitration, but not the merits. Counsel for the director and KLRCA did indicate to the court, during the course of submission on the above point, that the director and KLRCA would 'respect' any decision rendered by this court, although both relied on absolute immunity from process. It was contended for Orisoft inter alia, that the conduct of the director and KLRCA constituted an interference with the subject matter of the arbitration and was tantamount to not recognising the validity of the interim order, despite the parties' agreement on the fees. The court also considered Infineon's application to set aside the final award essentially on the grounds of failure to comply with agreed procedure and breach of the rules of natural justice.

Held, dismissing plaintiff's case with costs:

(1) An institutionalised arbitration is less flexible than an ad hoc arbitration, since the arbitral tribunal will be subject to the administrative and procedural rules of the particular institution, and a measure of supervision by the institution to ensure compliance with these rules. The environment will be more facilitative rather than supervisory in a substantive sense, since the cardinal principles of party autonomy and minimalist intervention in arbitral proceedings, coupled with the concomitant principle that an arbitral tribunal is a master of its own procedure. It cannot be a correct proposition that within the framework of an institutionalised arbitration, the autonomy of the parties, and that of the arbitral tribunal, can be so easily displaced by the arbitral institution, since the framework is in the main facilitative or administrative in nature (see paras 73–74).

(2) Rule 7(4) is mandatory in its requirement that when fixing its fees the arbitral tribunal must consult the Director of the KLRCA, and the Director may herself undertake consultations with the parties before giving advice to the arbitral tribunal. The scheduled fees and KLRCA's administrative charges may in exceptional or unusual or unforeseen circumstances be adjusted but that had to be at the discretion of the Director of the KLRCA. With respect, these mandatory provisions, by which the Arbitral Panel have undertaken to be bound, were not complied with (see para 82).

(3) In the interest of preserving the autonomy of the arbitral panel, the court did believe it would be right to allow such a wide power to the director to interfere with an interim order made by the arbitral panel in the way it was sought to be done. The answer must surely lie with the provisions of the Arbitration Act 2005. The irony in this dispute was that both parties agreed on the fees, but the claimant, when told by the KLRCA that the fees should have followed the scheduled fees, then took issue with the arbitral panel and did not file the points of claim within the time stipulated in the interim order. The proper mode of challenge, should it be the intention of the claimant so to do, would be by resorting to, possibly, s 35(1)(b) to request the arbitral panel to give an interpretation of this specific part of the interim order (see para 82).

(4) As far as formal requirements of the rules of natural justice were concerned, no fault could be found in the decision of the arbitral panel. The arbitral panel itself was at fault in not complying fully with r 7(4) of the KLRCA Rules since it failed to discuss beforehand with the director the higher fees it sought to impose. On the question whether it would be fair and reasonable in the circumstances to allow the final award to stand, this court regretfully noted that the arbitration law, as it currently stands, does not allow this court to venture beyond procedural due process, since considerations of fairness of a particular decision of the arbitrators go to the merits and therefore were not a proper subject matter for this court to interfere. Therefore, on the facts and the law, and upon considering the full array of arguments by both counsel, the final award should stand (see para 88).

[Bahasa Malaysia summary

Pada amnya pertikaian tersebut adalah berkaitan award timbang tara yang disampaikan oleh tribunal timbang tara tiga orang di mana penuntut adalah Infineon dan responden adalah Orisoft, yang telah menuntut balas terhadap Infenion. Infenion telah memulakan prosiding penimbangtaraan terhadap Orisoft di bawah fasal 26 tentang kenyataan kerja yang boleh dipakai yang telah disempurnakan antara pihak-pihak untuk projek yang dikenali sebagai 'Malaysia Payroll and Time Management Systems Agreement'. Orisoft yang bergantung kepada fasal 26 telah melantik penimbang taranya sendiri, Encik

Chan Kok Chong dan Infenion telah melantik Dato Shaik Daud Ismail, dan kedua-dua penimbang tara bersama tersebut telah melantik Cik Low Beng Choo, sebagai penimbang tara ketiga. Pelantikan panel penimbang tara telah disahkan oleh KLRCA menurut artikel 7(1) Kaedah-Kaedah UN CITRAL, dan telah dicatatkan dalam surat yang melampirkan surat pelantikan penimbang tara yang bersidang yang telah dihantar oleh KLRCA terus kepada penimbang tara yang bersidang itu. Melalui perintah interim, pihak-pihak bersetuju, antara lain, tentang struktur bayaran penimbang tara-penimbang tara dan permohonan Akta Timbangtara 2005. Oleh sebab fasal 1 kepada perintah interim telah dibuat tanpa mematuhi k 7(4) Kaedah-Kaedah KLRCA, KLRCA 'instructed' penimbang tara-penimbang tara membatalkan fasal 1 kepada perintah di atas. Penimbang tara yang menjadi pengerusi menyatakan bahawa pengarah mahupun KLRCA tidak mempunyai kuasa untuk mengeluarkan arahan kepada tribunal timbang tara. Penimbang tara yang menjadi pengerusi juga telah memberitahu pengarah (dengan membuat salinan surat kepada peguam cara bagi pihak-pihak) bahawa oleh kerana penuntut telah gagal mematuhi perintah interim itu, yang menurut penimbang tara yang menjadi pengerusi itu masih berkuat kuasa, tribunal timbang tara telah menetapkan perkara tersebut untuk perbicaraan tunjuk sebab. Perbicaraan tunjuk sebab telah diadakan seperti dijadualkan dengan kehadiran peguam cara penuntut, Pengarah Urusan Orisoft dan peguam caranya. Tribunal timbang tara kemudian telah menyampaikan award muktamadnya. Tribunal tersebut berpuas hati bahawa Infenion telah gagal menunjukkan sebab mencukupi untuk pelanggarannya atau ketidakpatuhan perintah interim itu, khususnya berkaitan memfailkan perkara-perkara yang dituntut dalam masa yang ditetapkan. Dalam konteks ini, isu-isu untuk ditentukan oleh mahkamah ini adalah sama ada terdapat pematuhan dengan proses sewajarnya di pihak tribunal, secara formal dan substantif, dan sama ada Pengarah KLRCA boleh campur tangan dengan tribunal timbang tara. Adalah dihujahkan bagi pihak Pengarah KLRCA bahawa apa yang dilakukan pengarah adalah menetapkan tarikh untuk mendengar cabaran itu, dan ini tidak boleh dibantahi dengan sendirinya kerana KLRCA telah melaksanakan penimbangtaraan itu, termasuklah bayaran yang perlu dibayar kepada penimbang tara-penimbang tara. Sehubungan itu, KLRCA telah melaksanakan aspek-aspek prosedur penimbangtaraan tetapi bukan atas merit. Peguam bagi pihak pengarah dan KLRCA telah memberitahu mahkamah, semasa penghujahan tentang perkara di atas, bahawa pengarah dan KLRCA akan 'respect' apa-apa keputusan yang dibuat oleh mahkamah ini, meskipun kedua-duanya bergantung kepada kekebalan mutlak daripada proses. Adalah dihujahkan bagi pihak Orisoft, antara lain, bahawa perlakuan pengarah dan KLRCA membentuk campur tangan dengan perkara penimbangtaraan dan sama seperti tidak mengiktiraf kesahan perintah interim tersebut, meskipun terdapat persetujuan pihak-pihak dengan bayaran tersebut. Mahkamah juga mempertimbangkan permohonan Infenion untuk mengetepikan award

muktamad pada dasarnya atas alasan kegagalan mematuhi prosedur yang dipersetujui dan pelanggaran rukun keadilan asasi.

Diputuskan, menolak kes plaintif dengan kos:

(1) Penimbangtaraan berinstitusi kurang fleksibel daripada penimbangtaraan ad hoc, memandangkan tribunal timbang tara tertakluk kepada kaedah-kaedah pentadbiran dan prosedur institusi tertentu, dan langkah pengawasan oleh institusi itu bagi memastikan pematuhan dengan kaedah-kaedah tersebut. Keadaan akan menjadi lebih kepada pemudahan dan bukan bersifat pengawasan secara substantif, memandangkan prinsip-prinsip utama autonomi pihak dan campur tangan minimum dalam prosiding timbang tara, ditambah pula dengan prinsip seiring bahawa tribunal timbang tara adalah yang mahir dalam melaksanakan prosedurnya sendiri. Ia bukan kenyataan yang betul bahawa dalam rangka penimbangtaraan berinstitusi, autonomi pihak-pihak, dan tribunal timbang tara itu, dengan mudah boleh digantikan dengan institusi timbang tara, memandangkan rangka tersebut adalah suatu yang bersifat pemudahan atau pentadbiran (lihat perenggan 73–74).

(2) Kaedah 7(4) adalah keperluan mandatori di mana apabila menetapkan bayarannya tribunal timbang tara patut berunding dengan Pengarah KLRCA dab Pengarah itu boleh dengan sendirinya menjalankan rundingan dengan pihak-pihak sebelum memberikan nasihat kepada tribunal timbang tara. Bayaran berjadual dan caj-caj pentadbiran KLRCA dalam keadaan luar biasa boleh diubah tetapi ia perlu dibuat atas budi bicara Pengarah KLRCA. Sehubungan itu, peruntukan-peruntukan mandatori tersebut, yang mana Panel Timbang Tara telah berjanji untuk terikat dengan, telah tidak dipatuhi (lihat perenggan 82).

(3) Demi kepentingan mengekalkan autonomi panel timbang tara, mahkamah percaya adalah wajar untuk membenarkan kuasa pengarah yang luas kepada pengarah untuk campur tangan dengan perintah interim yang dibuat oleh panel timbang tara dengan cara yang dipohon untuk dijalankan. Jawapannya semestinya terletak pada peruntukan-peruntukan Akta Timbangtara 2005. Ironi dalam pertikaian ini adalah bahawa kedua-dua pihak bersetuju tentang bayaran tersebut, tetapi penuntut, apabila diberitahu oleh KLRCA bahawa bayaran tersebut sepatutnya mengikut bayaran berjadual, kemudian telah membawa isu tersebut kepada panel timbang tara dan tidak memfailkan perkara tuntutan dalam masa yang ditetapkan dalam perintah interim. Cara yang wajar untuk mencabar, sekiranya itu niat penuntut untuk berbuat demikian, adalah dengan merujuk kepada, barangkali, s 35(1)(b) untuk memohon tribunal timbang tara memberikan pentafsiran kepada bahagian spesifik perintah interim ini (lihat perenggan 82).

(4) Setakat mana keperluan rukun keadilan asasi adalah berkaitan, tiada kesilapan boleh ditemui dalam keputusan panel timbang tara. Panel timbang tara sendiri telah gagal mematuhi sepenuhnya k 7(4) Kaedah-Kaedah KLRCA kerana ia telah gagal berbincang terlebih dahulu dengan pengarah tentang bayaran lebih tinggi yang ingin dikenakannya. Berhubung persoalan sama ada ia adalah adil dan munasabah dalam keadaan berikut untuk membenarkan award muktamad itu kekal, mahkamah ini dengan rasa kesal mengambil perhatian bahawa undang-undang penimbangtaraan, sepertimana ia berkuat kuasa kini, tidak membenarkan mahkamah ini melampaui proses prosedur yang perlu dilaksanakan, memandangkan pertimbangan tentang keadilan terhadap suatu keputusan tertentu para penimbang tara adalah bermerit dan oleh demikian bukan perkara utama yang wajar untuk campur tangan mahkamah ini. Oleh itu, atas fakta dan undang-undang, dan dengan mengambil kira keseluruhan hujah oleh kedua-dua peguam, award muktamad tersebut hendaklah kekal (lihat perenggan 88).]

Notes

For cases on arbitral tribunal in general, see 1 *Mallal's Digest* (4th Ed, 2005 Reissue) paras 1237–1239.

For cases on award in general, see 1 *Mallal's Digest* (4th Ed, 2005 Reissue) paras 1297–1433.

Cases referred to

Aloe Vera of America Inc v Asianic Food (S) Pte Ltd and another [2006] 3 SLR 174 (refd)

Cairns Energy India Pty Ltd v Government of India [2009] 6 MLJ 795; [2009] 1 LNS 1128, CA (refd)

Dancom Telecommunication (M) Sdn Bhd v Vuniasia General Insurance Bhd [2008] 6 MLJ 52; [2008] 5 CLJ 551, CA. (refd)

Downer Hill Joint Venture v Government of Fiji [2005] 1 NZLR 554 (refd)

Hebei Import & Export Corp v Polytek Engineering Co Ltd (1999) 2 HKCFAR 111 (refd)

London Export Corporation Ltd v Jubilee Coffee Roasting Co Ltd [1958] 2 All ER 411, CA (refd)

Oil and Natural Gas Corp Ltd v Saw Pipes Ltd 2003 AIR SC 2629 (refd)

Legislation referred to

Arbitration Act 1952

Arbitration Act 2005 ss 14, 15, 21, 34(1), 37, 37(2) (b)

CS Lam (CS Lam & Co) for the plaintiff in Originating Summons No R3-24-70 of 2009.

Sabarina Samadi (Zaid Ibrahim & Co) for the plaintiff in Originating Summons No R3-24-88 of 2009.

K Nayagan (Vinayak Pradhan with him) (Skrine & Co) for the second defendant in Originating Summons No R3-24-88 of 2009.

Khoo Guan Huat (Jeffery Cheong with him) (Skrine & Co) for the third and fourth defendants in Originating Summons No R3-24-88 of 2009.

Mohamad Ariff J:

INTRODUCTION

[1] There are two actions before this court involving the same parties in different capacities. In R3-24-88 of 2009, Infineon Technologies (M) Sdn Bhd ('Infineon') is a plaintiff with Orisoft Technology Sdn Bhd ('Orisoft') as the defendant. In the other action, namely R3-24-70 of 2009 Orisoft is the plaintiff with Infineon as the defendant. I had earlier granted an interim injunction directed against Infineon in the second case, and the matter is now before this court technically on an inter-partes hearing to set aside this interim injunction but since a disposal of the interlocutory application will in effect dispose of the substance of the dispute, parties are agreed that I hear and decide on the substantive action as well. The subject matter of the injunction is a 'notice of challenge' issued by Infineon against Orisoft and members of the arbitral tribunal in this case, under art 10 of the UNCITRAL Arbitration Rules.

[2] The main action is R3-24-88 of 2009, where Infineon is the plaintiff, is an application to set aside an award given by the arbitral tribunal on 10 September 2009. This award dismissed the claimant's (Orisoft's) claim with costs, but also held that Infineon be at liberty to file a counterclaim against Orisoft. The application to set aside is made under s 37(1)(a)(iii) and (vi) of the Arbitration Act 2005 ('the Act').

[3] The award dismissing the claim was made under s 27(d) of the Act which stipulates 'if without showing sufficient cause … the claimant fails to proceed with the claim, the arbitral tribunal may make an award dismissing the claim'. By way of introduction, it needs to be stated there were three other defendants in the second case, namely the solicitors for Infineon, Messrs Zaid Ibrahim & Co ('Zaid Ibrahim'), the Director of the Kuala Lumpur Regional Centre for Arbitration (Dato' Noorashikin binti Tan Sri Abdul Rahim) and the Kuala Lumpur Regional Centre for Arbitration itself ('KLCRA'). There was an ancillary application flowing from the injunction application by KLCRA and the director to strike out the claim against them on the ground of immunity. I allowed this claim. As far as the claim against Zaid Ibrahim is concerned, Orisoft has withdrawn this claim against the firm. Thus, for the moment the only two parties in dispute are Infineon and Orisoft.

[4] Despite the successful claim for immunity, the Director of KLRCA, and the KLRCA had earlier indicated to this court through their counsel that they would respect any decision of this court affecting the two immediate parties in this dispute.

[5] As earlier indicated, the substance of this dispute concerns an arbitral award handed down by a three-man tribunal, where the claimant is Infineon and the respondent is Orisoft, which has counterclaimed against Infineon.

[6] The background facts to this present dispute before this court are not straightforward and therefore have to be carefully analysed in the context of the relevant provisions in the Arbitration Act of 2005, and the applicable rules of procedure initially agreed by the parties to govern the arbitral proceedings.

[7] At the heart of this dispute is extent of applicability of the UNCITRAL Rules in relation to arbitral proceedings conducted under the auspices of the KLRCA, in light of an express provision in the arbitration agreement (cl 26) which refers to the arbitration being intended to be 'resolved by applicable rules at the Regional Centre for Arbitration in Kuala Lumpur for the time being in force, which rules are deemed to be incorporated by reference in this Clause'.

[8] I now proceed to analyse the background facts in some detail, given the importance of these facts to a proper resolution of this dispute.

BACKGROUND FACTS

[9] Disputes having arisen between Orisoft and Infineon, Infineon commenced arbitration proceedings against Orisoft under cl 26 of the applicable statement of work executed between the parties for a project called 'Malaysia Payroll and Time Management Systems Agreement'. Given the importance of this particular cl 26, it deserves a full quotation:

> Infineon and the service provider shall first discuss disputes arising out of or relating to this SOW. Any dispute that cannot be resolved within 30 calendar days (from written notification that there is a dispute), including any question regarding its existence, validity or termination, shall be referred to and finally resolved by arbitration *by applicable rules at the Regional Centre for Arbitration in Kuala Lumpur for the time being in force, which rules are deemed to be incorporated by reference in this Clause*. The place of the arbitration shall be in Malaysia. The language of the arbitration shall be in the English language unless agreed otherwise in writing duly signed by the parties. The number of Arbitrators shall be 3, 1 to be appointed by the service provider, 1 to be appointed by Infineon, and the Third Arbitrator to be nominated jointly by the two Arbitrators so appointed by the parties. (I add the emphasis above, to which I will return later.)

[10] Orisoft, relying on cl 26, appointed its own arbitrator, Mr Chan Kok Chong; Infineon appointed Dato Shaik Daud Ismail, and both arbitrators jointly appointed Ms Low Beng Choo, as the third arbitrator. The appointment of the panel of arbitrators was confirmed by the KLRCA in accordance with art 7(1) of the UNCITRAL Rules, and recorded in the letter enclosing the letter of appointment of the presiding arbitrator dated 23 February 2009 sent by the KLRCA directly to the presiding arbitrator.

Letter of Appointment

[11] This letter of appointment too deserves to be quoted in its relevant parts:

> We are pleased to enclose here with letter of appointment as well as the statement of independence in triplicate for your signatory….
>
> The particulars of the arbitration matters are as follows:
>
> (a) Claimant's solicitors: Messrs Zaid Ibrahim and Co.
>
> (b) Respondent's solicitors: Messrs CS Lam & Co.
>
> (c) Brief summary of the dispute: breach of contract.
>
> *The arbitration proceedings are to be conducted in accordance to the KLRCA Rules for Arbitration. All hearings are to be conducted at KLRCA.*
>
> This being a domestic arbitration matter, your fees will be paid in accordance to the domestic schedule fees, provided under the KLRCA Rules. The decision of the Director as to the amount payable to you will be final and not subject to further review. This proposal to appoint you is made personally to you and the services are expected from you. All payments, where applicable, shall be made to you and not to your firm or company or employers. …

Statement of Independence

[12] Ms Low Beng Choo then signed the 'Statement of Independence' and stated she was conversant with the UNCITRAL Arbitration Rules, as modified by the KLRCA Rules, and she intended to implement the said Rules and would render an award within six months from the conclusion of proceedings. These were the exact words:

> (1) I am independent of the Parties and intend to remain so; 2.3.
>
> (2) To the best of my knowledge there are no facts of circumstances likely to give rise to justifiable doubts as to my impartiality or independence.
>
> (3) *I am conversant with the UNCITRAL Arbitration Rules as modified by the Rules of Kuala Lumpur Regional Centre for Arbitration and intend to implement them* and shall render an Award within six months from the conclusion of the proceedings.

[13] This arbitration was therefore in the circumstances regarded as an 'institutionalised arbitration' under the KLRCA. The exact consequences of this status are a matter of dispute between the parties, particularly in light of the applicability of the new Arbitration Act 2005. The legal consequences are closely intertwined with the facts of this case and the interpretations placed by the respective parties on these facts.

Preliminary meetings and interim order

[14] The presiding arbitrator started the arbitral process by writing to the parties calling for a preliminary meeting on 30 April 2009 at the KLRCA. Again, it is important to appreciate the contents of this letter dated 2 March 2009. In this letter the presiding arbitrator stated, as the purpose of the preliminary meeting, to establish, inter alia, matters relating to venue, proceeding and recording, possible dates, time of hearing, who can attend, and forecasts in completing procedures and hearing to include the filing of points of claim and defence and counterclaim, if any. This letter ended as follows:

> You may note that the failure of one party to appear will not necessarily prevent the hearing from taking place as there are procedures, which allow the hearing to proceed ex parte.
>
> When providing any information to the Arbitrator, each party is required to provide identical information to the other party, and to indicate clearly in any correspondence that this has been done.
>
> The KLRCA Rules for Arbitration should be noted and the parties are directed to comply, where appropriate…. (Emphasis added.)

[15] I pause here to emphasise that even at this juncture the presiding arbitrator expressly referred to the KLRCA Rules for arbitration and parties are directed to comply, 'where appropriate'.

[16] The first preliminary meeting was held as scheduled at the KLRCA, and arising from this meeting, proposals were made on the fee structure. The parties were asked to give their written confirmation to this by Thursday 30 April 2009.

[17] A second preliminary meeting was held on 30 April 2009 at KLRCA, and this resulted in an interim order being made by the abitral panel. At this second preliminary meeting, the general counsel for Infineon was present together with two of its solicitors (Ms Sabarina Samadi and Mr Nadarashnaraj), and Orisoft was represented by Mr Raymond Su Do, its managing director and Orisoft's counsel, Mr CS Lam. It is very necessary to understand and appreciate the contents of this interim order so as to then

understand the subsequent course of events which have led to these two actions being filed in court. This is what the interim order says:

Interim Order

Upon Hearing the Parties named above for the Claimant and the Respondent, in the presence of the respective Solicitors above named for the Claimant and the Respondent, at the Preliminary Meetings held on the 13th day of April 2009 and on the 30th day of April 2009.

AND UPON READING the Arbitral Tribunal Letter dated the 13th day of April 2009 AND upon reading the Agenda for Preliminary Meeting as contained in the Arbitral Tribunal Letter dated 17th day of April 2009, the following ORDER is hereby issued:

1. *Both the Claimant and Respondent have agreed and have approved and adopted the Arbitrator's Fee Structure as follows, to be shared equally between the Parties*:

1.1. A non-refundable retainer of RM 50,000… only the Arbitrator, which shall be paid to the Kuala Lumpur Regional Centre for Arbitration on or before the 30th day of April 2009;

1.2. A fee of RM 4000… only per Arbitrator for attending to the Preliminary Meeting of the 13th day of April 2009 and on the 30th day of April 2009, which shall be paid to the Arbitrators on or before the 30th day of April 2009;

1.3. A fee of RM 2000… only per Arbitrator for each day, (or part thereof), of Preliminary Meeting, which shall be paid to the Arbitrators at the meeting itself;

1.4. A refresher fee of RM 5000… only per Arbitrator for each day of Hearing or part thereof, to be paid to the Arbitrators at the start of each day's hearing;

1.5. If the dates fixed for hearing are ordered to be vacated or adjourned, at the request of one or both parties:

(1.5.1) 30 days unless before the Hearing date or dates, 70% of the Refresher Fee for the date or dates shall be payable;

(1.5.2) 21 days to 45 days before the Hearing date or dates, 30% of the Refresher Fee for the date or dates shall be payable;

(1.5.3) More than 45 days before the date of dates, no Refresher Fees shall be payable….

1.8. All costs and expense incurred or to be incurred as regards the Kuala Lumpur Regional Centre for Arbitration shall be borne and paid by the parties.

The Claimant shall inform the Kuala Lumpur Regional Centre for Arbitration of the agreement and adoption of both parties to the Arbitrators' Fee Structure as contained in Clause 1 of this Interim Order.

The Claimant and the Respondent are to respectively submit a brief description of the dispute within 21 days from the date of this Interim Order;

The Arbitration is to be conducted under the Arbitration Act 2005;

The Claimant is to serve the Points of Claim on the Learned Arbitrators and the Respondent by 15th June 2009;

The Respondent is to serve the Points of Defence and Counterclaim, if any, on the Learned Arbitrators and the Claimant's by *27th of July 2009*….

Parties to make all communication and submissions to the Learned Arbitrators in writing, with copies to the other party;… (Emphasis added.)

[18] Four important facts are immediately apparent from the contents of the interim order. One, the parties have agreed and approved the fee structure. Two, the claimant shall inform the KLCRA of the agreement and adoption of the fee structure. Three, the remainder of the retainer shall be paid to the KLRCA. Four, the arbitration shall be conducted under the Arbitration Act 2005. Up to this stage at least, there was unanimity on the fee structure, and the application of the Arbitration Act 2005 (a position which, with respect, is as plain as it can be, for what other Act is to apply except the 2005 Act in the circumstances?). The statement of work is dated 2006 and as such the Arbitration Act 2005 must apply.

The Subsequent Correspondence

[19] The next important document is a letter from Infineon's solicitors (Zaid Ibrahim) dated 30 April 2009 and sent to the Kuala Lumpur Regional Centre for Arbitration. This letter informed the KLRCA (to the attention of the director as well as the legal officer) that pursuant to discussions on clarification from the panel arbitrators and the second preliminary meeting, the parties were agreeable to the arbitrators' fee structure. Reference was also made to the preliminary advance deposit (with respect to the arbitrators' fees) that had been deposited by parties earlier on 21 September 2007 with the KLRCA. The KLRCA was informed the arbitrator's fee structure would include this preliminary advance deposit. The letter ended by stating:

> In this regard, we take note of your instructions in your letter dated 17th April 2009, that parties are not to make any payments unless the request for payment is made by the KLRCA. *In line with the foregoing, we would be obliged if the relevant notifications for payments could be made to the parties with regards to the Arbitrators Fees* and/or any other payments, as and when such payments become due and payable.

[20] This letter, by its very terms, did not inform the KLRCA about any dissatisfaction with the terms of the interim order, in particular cl 1 thereof. In fact, it stated very clearly the parties would be obliged if KLRCA could issue the relevant notifications for payments with respect to the arbitrators' fees so that payments could be made. This letter is obviously in line with cl 2 of the interim order, which, as has been previously noted, requires the claimant (Infineon) to inform the KLRCA about the agreement and adoption by both parties of the arbitrators' fee structure stated in the interim order. This letter to the KLRCA from Zaid Ibrahim was copied to all three arbitrators, Orisoft's solicitors and

Infineon.

KLRCA's letters of 5 June and 12 June 2009

[21] What followed next was at odds with the previous consensus of the parties. The KLRCA, through its legal counsel, Ms Shereen Khan, acting for an on behalf of the director, concluded that cl 1 of the interim order was made without compliance with rule 7(4) of the KLRCA Rules, and the arbitrators were 'instructed' to revoke cl 1 of the Order. This relevant letter to the arbitrators is dated 5 June 2009, and again it is necessary to quote the contents in full:

> We have perused the Arbitral Tribunal's Interim Order dated 30th April 2009, which we received on 29th of May 2009.
>
> The above reference is conducted under the auspices of Kuala Lumpur Regional Centre for Arbitration (KLRCA) Rules. It is therefore an Institutionalised Arbitration.
>
> Clause 1 of the said Order was made without compliance with Rule 7(4) of KLRCA Rules. We now have to instruct you to revoke the said Clause 1 of the said Order.
>
> In the event that you do not wish to proceed as members of the Tribunal for this reference, kindly inform us by/before 10th June 2009.

[22] This letter was followed by another letter from KLRCA, dated 12 June 2009, this time sent to the solicitors for the parties. This is what it says:

> We have to inform you that the Chairman and Mr. Chan Kok Choong are accredited on our Panel. We did not object to the selection of the members of the Tribunal, as the right to choose the Arbitrators are provided under Article 7(1) of the UNCITRAL Rules for Arbitration. It is obvious that the Tribunal has no knowledge, or refused to acknowledge, the KLRCA Rules for Arbitration, which is a procedural rules for this reference.
>
> Subject to your agreement, the Director is able to ask Ms. Low Beng Choo to withdraw herself as a member of the Tribunal, on the grounds that she is not conversant with the KLRCA Rules and falsely declaration (sic) of her knowledge of the KLRCA Rules.
>
> However, as the appointment of the other 2 Arbitrators was made by you respectively, we can request them to withdraw themselves, if you inform us in writing.
>
> In the event that you wish to change the members of the Tribunal, we are able to assist you in providing you with a list of capable and independent Arbitrators.
>
> Bearing in mind that this is a Domestic Arbitration, we suggest that the Tribunal be a Sole Arbitrator. A list of three (3) names can be provided for your selection, is in accordance with Article 6(3) of the UNCITRAL Rules for Arbitration.

[23] The evidence does not appear to disclose very clearly whether this letter was copied to the Arbitrators directly.

Reply from presiding arbitrator of 2 September 2009

[24] It is important to note that the letter to the arbitrators was not replied until much later, namely on 2 September 2009. This letter from the presiding arbitrator was sent to the director directly, in short informing the director that the KLRCA's letter dated 5 June 2009 was 'misconceived and ultra vires' and neither the director nor the KLRCA had powers to issue directions to the arbitral tribunal. The contents in full, very briefly and directly, states:

> In consultation of the other two Learned Arbitrators to your Legal Counsel's letter dated 5th June 2009 in respect of the above matter, please note as follows:
>
> 1 This Arbitral Tribunal is appointed by parties in the matter and the arbitration is conducted under the Arbitration Act 2005;
>
> 2 Your letter dated 5th June 2009 is misconceived and ultra vires as neither you nor the Kuala Lumpur Regional Centre for Arbitration have powers to make directions to the Arbitral Tribunal;
>
> 3 There are no provisions under the Arbitration Act 2005 for the Arbitral Tribunal to revoke the said I Interim Order which was perfected;
>
> 4 In any event, the Interim Order date dated 30th April 2009 was by consensus of parties; and
>
> 5 You and or parties were at liberty to appeal, if deemed necessary, against the said Interim Order accordingly and the time limit to file such appeal has lapsed.
>
> The Interim Order dated 30th April 2009 remains in full force. We inform that as the Claimant has failed to comply with the said Interim Order, the Arbitral Tribunal has fixed the matter for a Show Cause Hearing, particulars as follows;
>
> Date: 10th September 2009
>
> Time: 2.00 p.m.
>
> Venue: Meeting Room, Royal Lake Club, Kuala Lumpur.

The further correspondence (5 June to September)

[25] Between 5 June and 2 September 2009, there followed numerous correspondences between the parties, the arbitrators and the KLRCA. From a position of initial agreement and consensus on the fee structure, the relationship became acrimonious, leading to the show cause proceeding by the arbitral panel and the final award dismissing the claim.

The response by the claimant (Infineon)

[26] After receiving the letter from KLRCA dated 5 June 2009, Infineon's

solicitors' wrote to the arbitrators stating that it appeared that KLRCA had taken issue on the arbitrators' fee structure contained in cl 1 of the interim order dated 30 April 2009. The solicitors stated that they were informed the said fee structure was not done with the approval of KLRCA and therefore did not comply with r 7(4) of the KLRCA Rules. It also noted the KLRCA had recommended revocation of cl 1 of the interim order. The letter ended by stating:

> We noted that the issue of the Fee Structure may have material consequence on the appointment of a Panel of Arbitrators. In light of the development and to preserve our client's position, kindly note that it is our instructions to postpone the filing of the Claimant's Points of Claim, pending determination of the issue of the Arbitrators' Fee Structure by the KLRCA.

[27] It has to be stressed here Infineon's solicitors were merely reserving their client's position until the issue of the arbitrators fee structure was determined by KLRCA.

[28] On 13 July 2009 the KLRCA wrote to the solicitors for both parties requesting for information on the status following from their letter of 12 June 2009, as has already been referred to above.

[29] On 6 August 2009 Infineon's solicitors again wrote to the Director of KLRCA by which they informed the director that they had not received any reply from the arbitral tribunal regarding the issue of the arbitrators' fee structure. The solicitors then proposed that the meeting be held between the parties, chaired by the KLRCA, 'to discuss the way forward in this matter, in particular, on the revocation of cl 1 of the interim order'.

[30] The KLRCA then responded by letter dated 10 August 2009, which was addressed to both solicitors, in which the KLRCA referred to the letter from Zaid Ibrahim, stating that the KLRCA would like to convene a meeting with the parties' solicitors with respect to the issues raised in the letter from Zaid Ibrahim. The meeting was scheduled for 12 August 2009 at 3pm at the KLRCA.

The Response from Orisoft's solicitors

[31] CS Lam & Co then responded to the KLRCA on 18 August 2009 putting on record that to date there had not been any response from the arbitrators to the KLRCA, and therefore their client had instructed them that they were waiting for the response from the arbitrators to the KLRCA's letter dated 5 June 2009. The solicitors also referred to the letter from Zaid Ibrahim

and said: 'As the subject issue (as cl 1) has yet to be replied by the arbitrators concerned, our client insist to await the reply and the proposal of the claimant for any meeting is not agreeable'.

[32] The KLRCA responded on 11 August to CS Lam's letter stating:

> The due date given to the Tribunal was 10th June 2009 and we do not receive any response from the Tribunal till to date. That is the reason that the meeting was called to discuss the issues stated in our letter dated 12th June 2009.
>
> Kindly attend the meeting in order to expedite the above reference smoothly.

[33] Orisoft's Solicitors replied on the next day reiterating their client's position and emphasising that they had no instruction to attend any meeting as proposed for the time being.

KLRCA's letter of 17 August 2009

[34] Despite being informed by Orisoft's solicitors that they had no instructions to attend the meeting and preferred to await a response from the arbitrators, the KLRCA proceeded with the meeting on 12 August 2009 with only Zaid Ibrahim present. The result of the meeting was conveyed to Orisoft's solicitors by KLRCA's letter dated 17 August 2009 in which a number of proposals from the director was stated. The director proposed the withdrawal of the appointment of the respective arbitrators and to proceed with the reference with a sole arbitrator tribunal. This important letter, again under the hand of legal counsel of KLRCA, has to be quoted in full in view of its surprising conclusion. This is what it says:

> We have proceeded with the meeting as scheduled on 12th August 2009 with Messrs Zaid Ibrahim & Co because we have not received any response from the Tribunal. The Director proposes the following:
>
> (i) To withdraw the appointment of respective Arbitrators in the above reference; and
>
> (ii) To proceed this reference with a Sole Arbitrator Tribunal.
>
> Upon confirmation by the parties of the above proposal, the Director shall provide three (3) names in accordance with Article 6(3) of UNCITRAL Rules. Within 15 days upon receipt of the names, each party may return the list after having deleted the names of objection and numbered the remaining names on the list in the Order of preference. If this reference shall proceed with a Sole Arbitrator, the Centre shall refund the balance of unexpended money to the parties accordingly.
>
> However, *if your client wishes to proceed with the three (3) members Tribunal, your client is to make a payment as per Clause 1 of the Order dated 30th April 2009 issued by the Tribunal, by/before 28th August 2009*. (Emphasis added.)

CS Lam's letter dated 25 August 2009

[35] It is difficult to comprehend this conclusion in KLRCA's letter. From an earlier position that the arbitrators did not comply with r 7(4) of the KLRCA Rules and its 'instruction' to the presiding arbitrator to revoke cl 1 of the interim order, it now appears at this stage that the KLRCA acknowledges the validity of cl 1, since it was allowing the parties, at any rate Orisoft, the option to proceed with a Three-Member Tribunal and to make payment as per cl 1 of the interim order. This surprising turn of events led to the sending of a letter from Orisoft's solicitors dated 25 August 2009 to the arbitral tribunal in which they stated Orisoft's instructions to comply with interim order of 30 April 2009. Cheques for the payment of RM45,918 being the balance of payment under cl 1.1 of the interim order and the sum of RM6000 being the portion of payment as per cl 1.2 of the interim order were enclosed, as stated in the letter 'for you to either hold the said sums pending the completion of the arbitration or to deposit the said sums to the KLRCA or at your discretion deem necessary in full compliance with Clause 1 of the Interim Order'. The rest of the letter reads as follows:

> 3. We also refer to the letter of Messrs Zaid Ibrahim & Co dated 15/6/2009. Messrs Zaid Ibrahim has indicated that they are not complying with Clause 1 of the Interim Order dated 30/4/2009 and that they are also not proceeding to file the Claimant's Point of Claims thereby in breach of Clause 5 of the Interim Order dated 30/4/2009. In view thereof, it is impossible for our client to file the points of defence and counterclaims as a direct result of the said action of Zaid Ibrahim & Co.
>
> (3.1) In the circumstances, our client's instruction is to take the view that the Claimant has thereby abandoned its claims for breaching and/or non-compliance with the terms of the Interim Order dated 30/4/2009.
>
> 4. Notwithstanding, we are instructed by our client to enclose herewith the following corresponding letters ensued between KLRCA and Zaid Ibrahim & Co and our reply to KLRCA for the Honourable Arbitral Tribunal's reference; --
>
> (a) KLRCA's letter dated 5/6/2009;
>
> (b) KLRCA's letter dated 12/6/2009;
>
> (c) the Zaid Ibrahim & Co's letter dated 15/6/2009
>
> (d) KLRCA's letter dated 13/7/2009;
>
> (e) KLRCA's letter dated 29/7/2009;
>
> (f) Zaid Ibrahim & Co's letter dated 6/8/2009;
>
> (g) KLRCA is letter dated 10/8/2009;
>
> (h) CS Lam & Co's letter dated 10/8/2009;
>
> (i) KLRCA's letter dated 11/8/2009;
>
> (j) CS Lam & Co's leter dated 12/8/2009

(k) KLRCA's leter dated 17/8/2009

5. Based on those letters enclosed as per para 4 herein above stated, *our client's instruction is to seek further direction*, if any, from this honourable Arbitral Tribunal. (Emphasis added.)

[36] This important letter was copied to the KLRCA as well as to Infineon's solicitors.

KLRCA's response and reference to 'Justifiable Doubt as to Tribunal's Impartiality'

[37] The day after this letter was copied to it, the KLRCA responded to Orisoft's solicitors reminding that the purpose the director called for the meeting with the parties was to ensure that this reference was resolved through fair, expeditious and inexpensive procedures. This letter further stated:

> Arbitration on the KLRCA Rules is an institutionalised arbitration. We administer and ensure that the Tribunal is not aware of any party's decision. You have however proceeded to write to the Tribunal instead of to us. Your conduct can give rise to justifiable doubt as to the Tribunal's Impartiality. The Claimant is now at liberty to file an application under Article 10 UNCITRAL Arbitration Rules.
>
> As your client wishes to pay the amount has not been approved by the Director in accordance with Rule 7, the money is remitted to KLRCA by /before 28th August 2009.
>
> Kindly note that Claimant had informed Tribunal with regard to the filing of the Claimant's Points of Claim by a letter dated 15th June 2009.
>
> We look forward to receiving the payments on this."

[38] This letter was copied to Infineon's solicitors. This was the first reference to art 10 of the UNCITRAL Arbitration Rules, and the raising of 'justifiable doubt' as to the Tribunal's Impartiality.

Reply from Arbitral Tribunal in Holding of Show Cause Hearing

[39] As earlier indicated, the next significant event is the correspondence from the presiding arbitrator to the director in reply to the KLRCA's letter of 5 June 2009, the contents of which I have quoted above. To recapitulate, the presiding arbitrator informed the director (with the letter copied to the solicitors for the parties) that as the claimant had failed to comply with the interim order, which according to the presiding arbitrator remained in force, the arbitral tribunal had fixed the matter for show cause hearing on 10th September 2009 at 2 pm in a meeting room, Royal Lake Club, Kuala Lumpur.

[40] The show cause hearing was held as scheduled with the presence of the solicitors of the claimant, the Managing Director of Orisoft and its solicitors. The arbitral tribunal then handed down its final award dated 10 September 2009.

The Final Award

[41] This final award runs to some 13 pages, and as earlier indicated, Infineon's claim was dismissed under s 27(d) of the Arbitration Act 2005 with costs to be paid by Infineon to Orisoft. I quote the relevant orders:

12. And in the premises, the Arbitral Tribunal hereby orders as follows:

(12.1) The Claimant's claim be dismissed under section 27 (d) of the Arbitration Act 2005 costs to be paid by the Claimant to the Respondent; and

(12.2) The Respondent be at liberty to file the Respondent's counterclaim, if any, afresh; and

(12.3) The Claimant pays, within 14 days of the date of this Order, to the Tribunal, through the Presiding Arbitrator as stakeholder for the Tribunal, the following amounts:

(12.3.1) RM 75,000, 00, being the Claimant's portion of the non-refundable retainer under Clause 1.1 of the Interim Order; and

(12.3.2) RM 6000.00 being the Preliminary Meeting Fees under Clause 1.2 of the Interim Order for the two Preliminary Meetings on 13th April 2009 and 30th of April 2009; and

(12.3.3) RM 7500.00 being the Show Cause Hearing Fee herein in accordance with Clause 1.4 of the Interim Order;

And the Claimant be at liberty to seek a refund of payments made by the Claimant to the KLRCA…

[42] For a proper judicial appreciation on why the arbitral tribunal decided to dismiss the claimant's claim, it is necessary to quote the other relevant parts of the final award in some detail:

AND the Tribunal, pursuant to the Respondent's Solicitors' said letter dated 25th of August 2009 requesting for further directions, and in view of the facts and circumstances, issued a notice to parties, to appear before the Tribunal for a Show Cause Hearing on this day;

AND the Tribunal took notice that the Claimant has failed and refused to comply with Clauses 1.1, 1.2 and 5 of the Interim Order, and the Claimant has failed and or refused to proceed with the claim, in that, as admitted by the Claimant's Solicitors:

(4.1) The Claimant has failed to pay the Claimant's portion of the agreed non-refundable retainer fee of the Arbitrators as stated in Clause 1.1 of the Interim Order…; and

(4.2) The Claimant has failed to pay the agreed fees of the Arbitrators for the two Preliminary Meetings held as stated in Clause 1.2 of the Interim Order…: and

(4.3) The Claimant has failed to file and serve the Points of Claim on the Arbitrators and the Respondent by 15th June 2009 as contained in Clause 5 of the Interim Order; and

(4.4) *As at 10th September 2009, the Claimant failed and or refused to comply with the Interim Order and has thereby breached the same*;

AND the Tribunal took notice of, *and sees no reasonable explanation*:

(5.1) For the parties and the KLRCA to correspond with each other as regards the matter without the prior knowledge or consent of the Tribunal, as a matter has been placed before, and within the jurisdiction of, the Tribunal; and

(5.2) For the Claimant to attend the meeting held on 12th August 2009 with the Director of the KLRCA, in the absence and the Respondent and or the Respondent's Solicitors; and without the prior knowledge or consent of the Tribunal;

AND the Tribunal saw no necessity for such correspondence and or communication and deem it improper:

(5.3) For the Tribunal to reply to any such correspondence whether from the KLRCA and or the parties; and

(5.4) For any unilateral approach by the KLRCA and or any party to the Tribunal.

AND the Tribunal took notice that at the show cause hearing on this day, the Claimant's Solicitors raised only two points as sufficient cause for the Claimants breach an award non-compliance of the Interim Order, namely:

(6.1) That the KLRCA had expressed dissatisfaction with the Arbitrators' Fees containing Clause 1 of the Interim Order; and

(6.2) That the Claimant was confused and or unsure as to which law is applicable in these proceedings, that is, whether the Arbitration Act 2005 of the Rules of the KLRCA… is applicable;

AND the Tribunal is hereby satisfied that the Claimant has failed to show sufficient cause, by virtue of Clause 6.1 above, for the Claimant's breach and or non-compliance of the Interim Order on the following grounds;

(7.1) Both parties reaffirmed that the Interim Order was issued by consensus and with the agreement of both parties; and

(7.2) As stated in Clause 2 of the Interim Order, the Claimant, through the Claimant Solicitor's letter dated 30th April 2009 to the KLRCA, confirmed parties' (including the Claimant's) agreement to the Arbitrators' Fees as stated in the Presiding Arbitrator's letter dated 13th April 2009, and which is set out in Clause 1 of the Interim Order; and

(7.3) In reply to the Tribunal's query as to whether the Claimant was now disputing the Arbitrators' Fees as agreed and set out in Clause 1 of the Interim Order, the Claimant's Solicitors confirmed at this hearing that the Claimant is not

A disputing the Arbitrators' Fees as set out in Clause 1 of Interim Order but noted the KLRCA's dissatisfaction thereto; and

(7.4) The KLRCA and the Director of the KLRCA are not a party in these proceedings but are a third party with no local standi in the matter notwithstanding its/her dissatisfaction to the agreed Arbitrators' Fees in the matter as stated in the B Interim Order; and

(7.5) Even assuming that the Claimant was still not satisfied with the Arbitrators' Fees and or any other terms, conditions and all stipulations in Interim Order, despite having agreed thereto, the Claimant could have but did not exercise their right to appeal against the same and the time for the Claimant to exercise such right to C appeal had lapsed. The Claimant's Solicitors also did not offer any answer as to why the Claimant did not exercise such right to appeal; and

(7.6) *In view of the above, the Tribunal fails to see any sufficient cause for the Claimant not to comply with Clauses 1.1, 1.2 and 5 of the Interim Order*;

D *And the Tribunal is hereby satisfied that the Claimant has failed to show sufficient cause, by virtue of Clause 6.2 above, for the Claimant's breach and or non-compliance of the Interim Order on the following grounds*;

(8.1) The Claimant's Solicitors acknowledge that Clause 4 the Interim Order expressly states that the arbitration hearing is to be conducted under the E Arbitration Act 2005 and could not provide any answer to the Tribunal's query as to what was not clear therein as to the applicable law for these proceedings; and

(8.2) The Arbitration Act 2005 is an Act of Parliament, subsequent to the Rules of the KLRCA made in 2003; and wherein the preamble of the Arbitration Act states F that it is "an Act to reform the law relating to domestic arbitration"; and

(8.3) In any event, it is trite law that if there is any conflict between an Act of Parliament and any Rules, the Act of Parliament, and in these proceedings, the Arbitration Act, being an Act of Parliament, shall prevail in all circumstances; and

G (8.4) Even assuming that the Claimant required determination of the applicable law, the Claimant did not exercise their right to refer the matter to the High Court for determination and applied for stay of these proceedings pending such application for judicial determination, and the time for the Claimant to so exercise such right to apply has lapsed. The Claimant's Solicitors also did not offer any answer as to why the Claimant did not exercise such right to apply for H judicial determination;… (Emphasis added.)

[43] It is evident from the relevant parts of the final award quoted above that the tribunal, after hearing the explanation from Infineon's solicitors,

I

[44] was satisfied Infineon had failed to show sufficient cause for its breach or non-compliance of theinterim order, in particular in regard to the filing of the points of claim by the stipulated time. In this context the issue of whether there has been compliance with due process on the part of the tribunal, both formal

and substantive, becomes a relevant consideration which I shall address below when the submissions of the respective parties, the relevant facts and the law are evaluated.

SUMMARY OF SUBMISSIONS OF THE PARTIES

The position taken by the Director and KLRCA

[45] As I indicated earlier, I had agreed with the third and fourth defendants' counsel with respect to the issue of immunity, and thereby struck out the claim against the third and fourth defendants. I did not then further decide on the issue of what the parties described as 'jurisdiction', namely whether the Director of the KLRCA could interfere with the arbitral tribunal in the manner already analysed above. It was then, and now, still necessary for this court to consider all the arguments of the parties on this point so as to reach a properly considered conclusion. Nevertheless, it is instructive to state here the position taken by counsel for the Centre and the director on this issue of jurisdiction. According to counsel, the KLRCA was set up to regulate arbitrations regionally. The arbitration here is an institutionalised arbitration under the KLRCA, and to that extent the parties' autonomy becomes limited. The arbitrators themselves are circumscribed by the choice of this institutionalised arbitration and the express choice of the KLRCA Arbitration Rules by the parties at the time they made the contract. On the facts, there was no element of bad faith or lack of bona fides on the part of the Director of the KLRCA. In relation to the fixing of the date to hear the notice of challenge, it was submitted any issues to be raised could be placed before the director. If I understood counsel properly, it was argued all that the director did was to fix the date to hear the challenge, and this could not be objectionable in itself because the KLRCA administered the arbitration, including fees to be paid to the arbitrators. In this regard, the KLRCA administered the procedural aspects of the arbitration, but not the merits.

[46] I must say here that there was an attempt to reach a consent order at the outset of this hearing between Orisoft and the Director and KLRCA, but the parties could not reach an agreement on the exact words to record the consent. Nevertheless, counsel for the director and KLRCA did indicate, during the course of submission on this point, that the director and KLRCA would 'respect' any decision rendered by this court, although both relied on absolute immunity from process.

The position taken by Orisoft

[47] As for Orisoft, there was, of course, the initial position taken, with which I did not agree, that this immunity was not absolute and could fall if bad

faith was established on the facts. Counsel was referring to s 48 of the Arbitration Act 2005 in this regard, which I found to be not quite relevant on the facts of this case; this particular section addresses the issue of immunity of the director in relation to any 'appointment' or 'nomination' of an arbitrator, and it provides that the director shall not be liable for anything done or omitted in the discharge of the function unless the act or omission is shown to have been in bad faith, but the facts of this case has nothing to do with the director appointing or nominating the arbitral panel. The director, on the facts of this case, is not the appointing authority of the arbitral panel and as such s 48 of the Act is irrelevant here.

[48] According to Orisoft, the conduct of the director and KLRCA constituted an interference with the subject matter of the arbitration and was tantamount to not recognising the validity of the interim order, despite the parties' agreement on the fees. Further, in raising the possibility of an art 10 challenge, the director had rendered assistance to the claimant, in spite of the final award having been issued by then. There was therefore evidence of bad faith in this regard. It was strongly argued before me that the functions of the KLRCA are merely administrative in nature and do not confer on the centre the power to hold 'judicial' proceedings, and by interfering with the functions of the arbitral panel here, the director had usurped the judicial function of the arbitral panel and hence her actions, and those of the KLRCA, were ultra vires. On the facts here, there had been a total disregard of the interim order and the final award, and this would be evidence of mala fides. Further, the parties had agreed to the adoption of the Arbitration Act 2005 as the governing Act, and therefore any dissatisfaction with any decision of the arbitral panel must be resolved under this Act. Infineon, as the first defendant, if unhappy with any decision on the panel, must rely on either s 14 or s 35 of the Act, instead of choosing to seek the assistance of the director and the KLRCA. This is particularly so since the art 10 notice was issued after the date of the final award, and by s 34(1) arbitral proceedings are deemed 'terminated' by a final award. In short, the arbitral panel would be 'functus officio'. Section 34(3) is also germane in this connection, providing:

> (3) Subject to the provisions of section 35 and subsection 37(6), the mandate of the Arbitral Tribunal shall terminate with the termination of the arbitral proceedings.

[49] The reliance on s 35 by Orisoft was premised on the argument that it was open for Infineon to give notice to, and with the agreement of the other party, request the arbitral tribunal to give an interpretation of the final award, within 30 days of receipt of the award. This Infineon had not done, choosing instead to give notice to the director under art 10 of the UNCITRAL Rules.

[50] As for s 14 of the Act, this provision deals with the disclosure of 'any circumstances likely to give rise to justifiable doubts' as to an arbitrators 'impartiality or independence'. Under sub-s 3, reference is made expressly to the arbitrator being challenged on this ground, and under s 15(1) the challenge has to be addressed to the arbitral tribunal with the right to apply to the High Court where the challenge is not successful. The written statement of the reasons for the challenge to the arbitral tribunal must be made within 15 days after becoming aware of the circumstances likely to give rise to justifiable doubts as to the arbitrator's impartiality or independence. See s 15(1).

[51] On the issue whether the final award was delivered in compliance with due process, counsel for Orisoft submitted very strongly that the fullest opportunity was given to Infineon to explain why it did not comply with the terms of the interim order, and the arbitral panel found

[52] unanimously, after this full opportunity was given, Infineon had failed to show sufficient cause.

The position taken by Infineon as claimant

[53] While not taking issue with the fact that Infineon agreed to the fees stated in the interim order, the company argued it was not aware that the arbitral panel had not discussed with the director prior to making the interim order. This, it said, was contrary to r 7(4) of the KLRCA Rules, and any order or award made without complying with the rules of procedure agreed to by the parties, would be null and void. Counsel cited before me the English case of *London Export Corporation Ltd v Jubilee Coffee Roasting Co Ltd* [1958] 2 All ER 4117, wherein Diplock J held:

> Where the award has been made by the Arbitrator in breach of the agreed procedure, the Applicant is entitled to have it set aside, not because there has been necessarily any breach of the rules of natural justice, but simply because the parties have agreed to be bound by an award made by the procedure in fact adopted… (at p 497 of the report)

[54] Reference was also made to Mustill and Boyd, *The Law and Practice of Commercial Arbitration in England*, (2nd Ed 1989) and the statement that the 'failure to comply with the agreement of the parties is misconduct, which may invalidate the award' and further, counsel placed reliance on the following passage:

> The question will then arise whether he has a power to adopt a different procedure, without the consent of the parties. Plainly, he has none, if the original procedure is the one expressly laid down by the Arbitration Agreement, or by a subsequent agreement between the parties (at p 291).

[55] This position in law, it was further argued, has been accepted by the Court of Appeal in *Dancom Telecommunication (M) Sdn Bhd v Vuniasia General Insurance Bhd* [2008] 5 CLJ 551.

[56] As indicated earlier in this judgment, Infineon is applying to set aside the final award under s 37(1)(a)(iii) and (vi) of Arbitration Act 2005. Sub-s (1)(a)(iii) refers to 'the party making the application was not given proper notice of the appointment of an arbitrator or the arbitral proceedings or was otherwise unable to present that party's case' and (iv) refers to 'the arbitral procedure was not in accordance with the agreement of the parties'. These provisions of course have to be read in connection with s 37(1)(b)(ii) and (2) which relate to the final award being in conflict 'with the public policy of Malaysia' and the award is said to be in conflict with such public policy where 'breach of the rules of natural justice' has occurred either 'during the arbitral proceedings' or 'in connection with the making of an award'.

[57] This was how the claimant/Infineon concluded:

> … the Plaintiff submits that the award by the Tribunal should be set aside by this honourable court as it is very clear from the facts that:
>
> (i) The Tribunal had departed from the KLRCA Rules in conducting the arbitration even the parties had agreed that the KLRCA Rules would govern the procedure for arbitration;
>
> (ii) The Tribunal had completely disregarded the role and powers of the Director in the discharge of powers to administer and facilitate the arbitration in accordance with the KLRCA Rules;
>
> (iii) The Tribunal had totally ignored the role of the Director in the carrying out of the arbitration proceedings which led to show cause hearing and verbal award on 10th September 2009.
>
> As a result, the Plaintiff has suffered a real injustice and their claim against the Defendant was dismissed outright without even having the opportunity to present its case."

[58] It was argued that the arbitribunal should have at least made an 'unless order', which would have been fairer in the circumstances, to allow Infineon an opportunity to comply with the filing of points of claim instead of dismissing the claim altogether.

THE ISSUES

[59] Having considered the background facts, which are by no means straightforward and simple, and the respective submissions of the parties, which have been extended and intensive, and for which I am indebted to

counsel, the issues presented in both suits may, in my opinion, be summarised thus:

a what is the exact status of an institutionalised arbitration under the KLRCA Rules and to what extent the jurisdiction and autonomy of the Arbitral Tribunal can be regarded as affected by it?

b conversely, what is the extent of jurisdiction, authority and power of the KLRCA and its director in their roles vis-a-vis the arbitrators?

c more specifically, what is the effect of a breach of the KLRCA Rules in relation to 'costs' (to include Arbitrators' Fees) and in particular, a breach of r 7(4)?

d has the director of the KLRCA the jurisdiction, authority and power under the KLRCA Rules to 'instruct' the Arbitral Panel to revoke cl 1 of the interim order?

e has the Director the jurisdiction, authority and power to request the withdrawal of the presiding arbitrator, and the other members of the Arbitral Panel arising from the breach of the r 7(4)?

f can the Arbitral Panel ignore the instructions of the director and proceed with the arbitration in accordance with its interim order, and accordingly decide and hand down its final award?

g can the Arbitral Panel decide, in the circumstances of this case, to hand down the final award dismissing the claimant's case on the basis of the show cause proceedings *simpliciter*?

h can the decision of the Arbitral Panel in the final award be regarded as being against 'public policy' and therefore liable to be set aside under s 37(1) (a)(iii) and (vi), read together with s 37(1) (b)(ii) and (2) (b)?

i can the claimant act of the basis of art 10 of the UNCITRAL Rules and issue an art 10 Notice to be heard at the director in a 'challenge proceeding'?

j Generally, what are the exact relationships between the KLRCA Rules, the UNCITRAL Rules and the Arbitration Act 2005?

[60] I have analysed the issues as above for purposes of clarity, but they evidently overlap one with the other, and as such I shall evaluate and discuss them as an integrated whole below.

EFFECT OF INSTITUTIONALISED ARBITRATION

[61] Institutionalised arbitration, simply put, is a form of arbitration where the arbitration takes place within a particular institutional framework of an

arbitral organisation (such as the KLRCA), which provides a tested procedural framework within which the arbitration proceedings will be conducted. (See Gordon Blanke, *Institutional Versus Ad Hoc Arbitration: a European Perspective*, a paper presented at the ERA Conference on International Arbitration, 2007. This paper was advanced in argument by counsel for Infineon and I have taken the liberty to incorporate this in the judgment since it clearly sets out the differences between ad hoc and institutionalised arbitrations.) To this extent, an institutionalised arbitration is less flexible than an ad hoc arbitration, since the Arbitral Tribunal will be subject to the administrative and procedural rules of the particular institution, and a measure of supervision by the institution to ensure compliance with these rules. Nevertheless, it will be correct, in my view, to say the environment will be more facilitative rather than supervisory in a substantive sense, since the cardinal principles of party autonomy and minimalist intervention in arbitral proceedings, coupled with the concomitant principle that an Arbitral Tribunal is a master of its own procedure (subject of course to the constraint imposed by the choice of the applicable rules since the procedure will follow the rules applicable to the particular institution). In my view it cannot be a correct proposition that within the framework of an institutionalised arbitration, the autonomy of the parties, and that of the Arbitral Tribunal, can be so easily displaced by the Arbitral Institution, since the framework is in the main facilitative or administrative in nature. To recapitulate, even counsel for KLRCA and the director stated, at the beginning of these proceedings in relation to the challenge on immunity, the director and KLRCA are not concerned with the merits of the arbitration, but merely the administrative and procedural aspects. Of particular relevance in this connection is s 21 of the Arbitration Act 2005, which deserves a full quotation:

> 21. Determination of rules of procedure
>
> (1) Subject to the provisions of this act, parties are free to agree on a procedure to be followed by the Arbitral Tribunal in conducting the proceedings.
>
> (2) Where the parties failed to agree under subsection (1), the Arbitral Tribunal may, subject to the provisions of this act, conduct the arbitration in such manner as it considers appropriate.
>
> (3) The power conferred upon the Arbitral Tribunal under subsection (2) shall include the power to —
>
> (a) determine the admissibility, relevance, materiality and weight of any evidence;
>
> (b) draw on his own knowledge and expertise;
>
> (c) order the provision of further particulars in a statement of claim or statement of defence;
>
> (d) order the giving of security for costs;
>
> (e) fix and amend time limits within which the various steps in the arbitral proceedings must be completed;

(f) order the discovery and production of documents or materials within the possession of power of the party;

(g) order the interrogatories to be answered;

(h) order that any evidence be given on oath or affirmation; and

(i) make such orders as the Arbitral Tribunal considers appropriate.

[62] As can be seen from the very terms of s 21, the general principle is parties are free to agree on a procedure to be followed 'subject to the provisions of this Act'. This surely must be taken as the governing provision, even in the context of an institutionalised arbitration, for the Arbitration Act 2005 must override any rules of procedure chosen by the parties. It has to be stressed here both parties agree there is no inconsistency between the KLRCA Rules and provisions in the Arbitration Act 2005. This has to be so since under the new statutory regime, the jurisdiction of the KLRCA is not reserved in the same manner as that done under the Arbitration Act of 1952 (as amended). The KLRCA Rules used to be accorded a unique status under the 1952 Act by virtue of an amendment introduced by way of s 34(1) which stipulated that the 1952 Act applied to arbitrations except those held under the *Convention on the Settlement of Investment Disputes between States and Nationals of Other States 1965, The United Nations Commission on International Trade Law Arbitration Rules 1976* and *The Arbitration Rules of the Kuala Lumpur Regional Centre for Arbitration*. There is now no equivalent provision in the Arbitration Act 2005. It is therefore now clear that even the KLRCA Rules have to be seen as subordinate to the provisions of the 2005 Act.

[63] At this juncture it may be appropriate to consider what exactly do the KLRCA Rules say in the context of this dispute.

THE KLRCA RULES

[64] There are two parts to the Arbitration Rules of the Kuala Lumpur Regional Centre for Arbitration, namely Part 1 headed 'Specific Arbitration Rules' and Part 2 headed 'UNCITRAL Arbitration Rules'. Rules 7 headed 'Costs' falls within Part 1. Part 1 begins by providing for some general rules, inter-alia, stating:

Rule 1 – General

(1) Where the parties to a contract have agreed in writing that disputes in relation to the contract shall be settled or resolved by arbitration in accordance with the Rules for Arbitration of the KLRCA, then such dispute shall be settled or resolved by arbitration in accordance with the UNCITRAL Arbitration Rules (attach herein as Part II) subject to the modifications and alterations set forth in this Part 1: Specific Arbitration Rules.

(2) Part 1: Specific Arbitration Rules and Part II: UNCITRAL Arbitration Rules shall hereinafter be referred to collectively as 'these Rules'.

(3) Where the parties have agreed to refer their disputes to the Rules of Arbitration of the KLRCA for Arbitration, the parties shall be deemed to have agreed that the arbitration shall be conducted and administered by the KLRCA in accordance with these Rules….

(4) The Rules applicable to the arbitration shall be those in force at the time of commencement of the arbitration unless the parties have agreed otherwise.

(5) *In administering these Rules, the Arbitral Tribunal or the Director of the KLRCA, as the case may be, must have regard to the justice of the particular case in dispute and not only to the technical compliance or otherwise of these Rules.*

Rule 3 – Appointment

(1) Unless parties have agreed otherwise or if the appointing authority designated refuses to act or fails to appoint the Arbitrator, the KLRCA shall be the appointing authority.

(2) Where, pursuant to Article 6 or 7(3) of the UNCITRAL Arbitration Rules and sub (1) of this Rule, the KLRCA is to appoint a Sole Arbitrator or the Presiding Arbitrator, the list of names to be communicated by the KLRCA to the parties shall be determined by the Director of the KLRCA.

(3) Where, pursuant to Article 7(2) (a) of the UNCITRAL Arbitration Rules and sub Rule (1) of this Rule, the KLRCA is to appoint the Second Arbitrator, the Director of the KLRCA shall appoint the Second Arbitrator.

(4) *Where pursuant to Article 7(1) of the UNCITRAL Arbitration Rules, if three Arbitrators are to be appointed, each party shall appoint one Arbitrator. The two Arbitrators thus appointed shall choose the Third Arbitrator who will act as the Presiding Arbitrator of the Arbitral Tribunal. The chosen Presiding Arbitrator shall not be deemed appointed until confirmed by the Director of the KLRCA.*

Rule 7 – Costs

(1) The term "costs" specified in Article 38 of the UNCITRAL Arbitration Rules shall also include expenses reasonably incurred by the KLRCA in connection with the arbitration as well as its administrative charges.

(2) The facilities made available by the KLRCA itself may be charged for on the basis of the comparable costs.

(3) The administrative charges of the KLRCA shall be fixed by the Director of the KLRCA in accordance with the Costs of Arbitration in Appendix B (USD Scale) Appendix B1 (Ringgit Scale).

(4) *In fixing its fees, the Arbitral Tribunal shall consult with the Director of the KLRCA. The Director of the KLRCA may undertake consultations with the parties before giving advice to the Arbitral Tribunal. The Director of the KLRCA, in consultation with the Arbitral Tribunal and the parties, shall settle the basis of computation of fees and expenses in accordance with the schedule fees in Appendix A (USD Scale) or Appendix A 1 (Ringgit Scale) either before the Arbitral Tribunal take up their duties or as soon as practicable after the appointment of the Arbitral Tribunal.* As a general

rule, the USD Scale in appendix A is intended to apply to arbitrations which involve cross-border transactions or where a party or any Arbitrator is ordinarily resident outside Malaysia or where the arbitration is generally commonly considered by the arbitration community as an arbitration involving an international element, whereas the Ringgit Scale in appendix A 1 is intended to apply to all other types or categories of arbitrations. The Director of the KLRCA is to determine which of the schedule of fees is applicable to the arbitration. Such determination shall be final and conclusive and shall be binding upon the parties and the Arbitral Tribunal.

(5) The fees of the Arbitral Tribunal and the KLRCA's administrative charges may, in exceptional or unusual or unforeseen circumstances, be adjusted in the discretion of the Director of the KLRCA.

…

(8) If the parties have designated an appointing authority other than the KLRCA, the fees and expenses of the appointing authority shall be fixed by the Director of the KLRCA in consultation with the appointing authority.

Rule 11 - No Liability

Neither the KLRCA nor the Arbitrator shall be liable to any party for any act or omission related to the conduct of the arbitration proceedings.

Rule 13 - Non-Compliance

Without prejudice to the provisions in Article 30 of the UNCITRAL Arbitration Rules, non-compliance with Rules 2, 4, 5, 6 or 7 of Part 1 of these Rules shall not affect the validity or legality of the arbitral proceedings or the award unless such non-compliance has occasioned a substantial miscarriage of justice.

PART II - THE UNCITRAL RULES

[65] Article 1 of the UNCITRAL rules, in particular art 1(2), is noteworthy in the context of this dispute. Under cl 2, it is clearly specified that the Rules shall govern the arbitration 'except… where any of these Rules is in conflict with a provision of the law applicable to the arbitration from which the parties cannot derogate'. In this event that provision of the law shall prevail. In short, where there exists a specific, clear provision in the Arbitration Act 2005, the statutory provision must prevail. This position has to be understood in relation to the art 10 notice purportedly conveyed to the director. In the context of the art 10 challenge notice, and its reference to 'circumstances likely to give rise to justifiable doubts' as to an arbitrator's impartiality or independence, the UNCITRAL Rules further provide in art 10 and art 12, the specific mode of procedure applicable. Article 11 provides as follows:

1 A party who intends to challenge an Arbitrator shall send notice of the challenge within 15 days after the appointment of the challenge Arbitrator has been notified to the challenging party or within 15 days after the circumstances mentioned in Articles 9 and 10 become known to the party.

2 The challenge shall be notified to the other party, to the Arbitrator who is challenged and to the other members of the Arbitral Tribunal. The notification shall be in writing and shall state the reasons for the challenge.

3 When an Arbitrator has been challenged by one party, the other party may agree to the challenge. The Arbitrator may also, after the challenge, withdraw from his office. In neither case does this imply acceptance of the validity of the grounds of the challenge. In both cases the procedure provided in Articles 6 or 7 shall be used in full for the appointment of the substitute Arbitrator, even if during the process of appointing the challenged Arbitrator a party had failed to exercise his right to appoint or to participate in the appointment.

Article 12

[66] If the other party does not agree to the challenge and the challenged Arbitrator does not withdraw, the decision on the challenge will be made:

(a) When the initial appointment was made by an appointing authority, by that authority;

(b) When the initial appointment was not made by an appointing authority but an appointing authority has been previously designated, by that authority;

(c) In all other cases, by the appointing authority to be designated in accordance with the procedure for designating an appointing authority as provided for in art 6.

[67] If the appointing authority sustains the challenge, a substitute arbitrator shall be appointed or chosen under the procedure applicable to the appointment or choice of an arbitrator as provided in articles 6 to 9 except that, when this procedure would call for the designation of an appointing authority, the appointment of the arbitration shall be made by the appointing authority which decided on the challenge.

[68] The above Rules reflect the provisions in ss 14 and 15 of the 2005 Act, meaning to say, the challenge proceeding has to be made before the Arbitral Panel. There is no express provision, whether under the UNCITRAL Rules or the Act, allowing the KLRCA or its Director to be a party or an active participant in the process.

[69] On the other hand, the KLRCA Rules, by which the parties and the Arbitral Panel have expressly agreed to be bound and to apply, are equally clear on how fees are to be determined. Rule 7(4) is mandatory in its requirement that when fixing its fees the Arbitral Tribunal must consult with the director of the KLRCA, and the director may herself undertake consultations with the parties before giving advice to the Arbitral Tribunal. The scheduled fees and

KLRCA's administrative charges may in exceptional or unusual or unforeseen circumstances be adjusted but this has to be at the discretion of the director of the KLRCA. With respect, these mandatory provisions, by which the Arbitral Panel have undertaken to be bound, were not complied with. There is therefore merit in the Claimant's argument that when it agreed with the fees suggested by the Arbitral Panel, it was under the impression that the Arbitral Panel had consulted the director beforehand, which apparently it did not. Having reached this conclusion, the issue then becomes whether the KLRCA and its director can instruct the Arbitral Panel to revoke cl 1 of the interim order? Having considered the entire Part 1 of the KLRCA Rules, in particular the reference to the director of the KLRCA must have regard to the justice of the particular case in dispute and not only the technical compliance of these Rules, and that any non-compliance with inter alia, r 7, shall not affect the validity or legality of the arbitral proceedings unless the non-compliance has occasioned a substantial miscarriage of justice, I do not believe, on a proper and comprehensive reading of the KLRCA Rules, seen together with the provisions of the Arbitration Act 2005, the director must necessarily have that jurisdiction, authority or power to 'instruct' the Arbitral Panel to revoke cl 1 of the interim order. In the interests of preserving the autonomy of the Arbitral Panel, I do not believe it would be right for this court to allow such a wide power to the director to in fact interfere with an interim order made by the Arbitral Panel in the way it was sought to be done. The answer must surely lie with the provisions of the Arbitration Act 2005. The irony in this dispute is that both parties agreed on the fees, but the claimant, when told by the KLRCA that the fees should have followed the scheduled fees, then took issue with the Arbitral Panel and did not file the points of claim within the time stipulated in the interim order, without, it has to be noted, obtaining the approval of the Arbitral Panel to do so. The proper mode of challenge, should it be the intention of the claimant so to do, would be by resorting to, possibly, s 35(1)(b) to request the Arbitral Panel to give an interpretation of this specific part of the interim order.

[70] As the facts of this dispute indicate, there does not appear to be any neat legal solution to the problem in the absence of very clear provisions on the compulsive powers of the KLRCA and its director. The dispute also indicates how a delicate balancing between the jurisdiction, authority and powers of the director and KLRCA on one hand and the Arbitral Panel on the other, should be the prime consideration in this institutionalised arbitration, where the position of the KLRCA, as has been noted, tends to be more administrative and facilitative in nature. Where the applicable rules are made to work harmoniously, problems relating to arbitrators' fees should be the last matter to be brought to court for resolution, especially when all that is needed is for there to be a prior consultation and discussion with the director of the KLRCA. The procedure in relation to the fixing of fees was clearly breached by the Arbitral Panel, but having said this, the claimant then cannot take it upon itself not to

comply with the other aspects of the interim order, particularly in relation to the filing the points of claim within the stipulated time ordered. For this reason, I tend to be of the view that the principle in *London Export Corporation Ltd v Jubilee Coffee Roasting Co Ltd,*, should not apply in the peculiar circumstances of this present dispute, since the Rules themselves provide that the KLRCA must have regard to the justice of the particular case in dispute and not only to technical compliance, and further, any breach shall not affect the validity of legality of the arbitral proceedings unless there has been proven a *substantial* miscarriage of justice. I stress the word *substantial*. Any dispute on Arbitrators' Fees (after the event at that), which to my mind is not beyond resolution by the immediate parties, cannot in fairness lead to any *substantial* miscarriage of justice, if at all.

BREACH OF DUE PROCESS AND THE PUBLIC POLICY GROUND

[71] I now turn to the final award and the challenge mounted by Infineon under s 37 of the Arbitration Act to set aside the award, essentially on the grounds of failure to comply with agreed procedure and breach of the rules of natural justice. I have dealt with the issue of non-compliance with agreed procedure above. That leaves the second issue of the breach of the rules of natural justice and its effect on the final award. As seen earlier in this judgment, s 37(2) (b) links the concept of conflict with the public policy of Malaysia with the breach of the rules of natural justice occurring either during the arbitral proceedings or in connection with the making of the award. To quote subsection (2), 'an award is in conflict with the public policy of Malaysia where… a breach of the rules of natural justice occurred… during the arbitral proceedings… or in connection with the making of the award'. The concept of public policy as a ground to set aside an arbitral award remains a thorny area where the position of the law can vary widely, first, in relation to the question whether the award is a domestic arbitration award and second, whether it concerns an International Arbitration Award. In the case of the latter, the available comparative jurisprudence would appear to suggest a relatively narrow view being taken of the concept of public policy. A somewhat wider approach would apply in relation to a Domestic Arbitration Award, such as the case here. Nevertheless, there is always a danger that the court, when applying the concept of public policy in relation to breach of the rules of natural justice, might willy-nilly encroach upon the merits of the award and thus offend the basic principle that a setting aside proceeding must never be in the nature of an appeal. See the latest Court of Appeal decision in *Cairns Energy India Pty Ltd v Government of India* [2009] 1 LNS 1128and the very strong holding on this basic principle as can be found, for instance, in the following passage:

> Generally, to reopen or re-examine the merits of the case and in effect determine, and replace, the findings of the majority arbitrators… would fly against all established principles. (per Suriyadi Halim JCA at p 437)

[72] I now reproduce below some leading views taken on the issue of public policy in the area of arbitration law. For example, in the Hong Kong Court of final appeal decision in *Hebei Import & Export Corp v Polytek Engineering Co Ltd* (1999) 2 HKCFAR 111, Bokhary PJ said:

> … there must be compelling reasons before enforcement of the convention award can be refused on public policy grounds. This is not to say that the reasons must be so extreme that the award falls to be cursed by bell, book and candle. But the reasons must go beyond the minimum which would justify setting aside the domestic judgment award. A point to similar effect was made in a comparable context by the United States Supreme Court in *Mitsubishi Motors Corp v Soler Chrysler Plymouth Inc* [1985] 473 US 640…. the majority said this…:
>
> … concerns of international comity, respect for the capacities of foreign and Transnational Tribunals, and sensitivity to the needs of the International Commercial System for predictability in the resolution of disputes require that we enforce the parties' agreement, even assuming that a contrary result would be forthcoming in a domestic context…

[73] See also the Singapore High Court decision in *Aloe Vera of America Inc v Asianic Food (S) Pte Ltd and another* [2006] 3 SLR 174, where Judith Prakash J stated (at p 16 of the report):

> … the principle of international comity enshrined in the convention… strongly inclines the courts to give effect to foreign arbitration awards. As Litton PJ observed in the decision of the Hong Kong Court of Final Appeal in Hebei Import & Export Corp v Polytek Engineering Co Ltd… woven into the concept of public policy as it applies to the enforcement of foreign arbitration award "is the principle that courts should recognise the validity of decisions of Foreign Arbitral Tribunals as a matter of comity, and give effect to them, unless to do so would violate the most basic notions of morality and justice.

[74] Both leading cases in Hong Kong and Singapore relate to the enforcement of a foreign arbitral award. In both cases, the approach is not to refuse to register on the ground of conflict of public policy unless the most basic notions of morality and justice would be offended. Thus the approach is very restrictive, being grounded in the upholding of international comity. A less rigid approach should, in principle, apply where the award is a Domestic Arbitral Award, although the comparative jurisprudence on this matter cannot as yet be said as approximating a uniform approach. On one extreme, we have the Indian Supreme Court decision in *Oil and Natural Gas Corp Ltd v Saw Pipes Ltd* 2003 AIR SC 2629 where a wider scope is given to the term "public policy" in the context of arbitrations were Indian law is the substantive law. See the very useful discussion on this evolving area in Sundra Rajoo and WSW Davidson, The Arbitration Act 2005, at pages 173 to 178. The learned authors at paragraph 37.34 (page 177) has usefully cited the New Zealand Court of

Appeal decision in *Downer Hill Joint Venture v Government of Fiji* [2005] 1 NZLR 554, and I quote this useful passage:

> The relationship between errors of law and fact, breaches of natural Justice and public policy is explained in the New Zealand Court of Appeal case in *Downer Hill Joint-Venture v Government of Fiji* … where it was held as follows:
>
> A serious and fundamental error of law or fact could result in an award being contrary to the public policy of New Zealand because breaches of natural justice had occurred in connection with the making of the award. However, such a threshold was high and mere mistake would not suffice. In order to set aside an award for erroneous factual findings it had to be shown that the factual finding complained of was not based on any logically probative evidence. It had also to be shown that even if such a breach of natural justice had occurred the award was contrary to public policy. This required it to be shown that a substantial miscarriage of justice would result if the award stood because the impugned finding was fundamental to the reasoning or outcome of the award. Such a breach of public policy would be obvious.

EVALUATION AND CONCLUSION

[75] I find the approach taken by the New Zealand Court of Appeal particularly attractive, and the test of 'substantial miscarriage of justice' is particularly apposite bearing in mind what is provided in the KLRCA Rules, namely r 13 which uses the same concept. To recapitulate, r 13 states that non-compliance 'shall not affect the validity or legality of the arbitral proceedings or the award unless such non-compliance had occasioned a substantial miscarriage of justice'. Can it therefore be said on the evidence before this court that the final award has offended the principles of natural justice and has led to a substantial miscarriage of justice to the claimant? I have extensively quoted the relevant parts of the final award, and suffice to say that as far as formal requirements of the rules of natural justice are concerned, no fault can be found, in my opinion, in the decision of the Arbitral Panel. Whether in substance there has been due process is a more difficult question to answer. On the one hand, the claimant was drawn into this dispute because of the position taken by the director and KLRCA on cl 1 of the interim order in relation to the Arbitrators' Fees, which after all had been agreed by the parties. The claimant had reserved its position vis-a-vis the filing of the points of claim because of this matter of fees said to be in breach of r 7(4) of the KLRCA Rules. On the other hand, the claimant cannot be allowed to refuse to comply with other provisions of the interim order, particularly in relation to the filing of the points of claim within time, just because of the position taken by the KLRCA. In short, one could say it was not the fault of the Claimant entirely and as such would it be fair for the Arbitral Tribunal in the show cause proceeding to ignore these peculiar circumstances of the dispute? The Arbitral Panel itself was at fault in not complying fully with r 7(4) for the KLRCA Rules since it failed to

discuss beforehand with the director the higher fees it sought to impose. The claimant, Infineon, was under the mistaken impression it did. Will it be fair and reasonable in these circumstances to allow the final award to stand? Will it not be fairer to at least accord to the Claimant an opportunity to file its points of claim by an 'unless order'? Unfortunately and regretfully, arbitration law, as it currently stands, does not allow this court to venture beyond procedural due process, since considerations of fairness of a particular decision of the arbitrators go to the merits and therefore are not a proper subject matter for this court to interfere. I have to remind myself that, as far as suit no R3-24-88-2009 is concerned, this court is not exercising an appellate jurisdiction, and there the matter rests. I have therefore to conclude, on the facts and the law, and upon considering the full array of arguments by both counsel, the final award should stand. The claim by Infineon, as plaintiff, in R3-24-88-2009 is therefore dismissed with costs to be taxed, unless agreed.

[76] Since both suits are interconnected, based on the same reasons (in particular the absence of jurisdiction, authority and power on the part of the Director and KLRCA to conduct the challenge proceedings under art 10 UNCITRAL Rules), Orisoft's claim in suit R3-24-70-2009 for injunctive relief against Infineon is hereby allowed with costs, also to be taxed, unless agreed.

[77] Orders and judgments accordingly.

Plaintiff's case dismissed with costs

Reported by Ashgar Ali Ali Mohamed